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No. 80-108

IN THE

Supreme Court of the United States

October Term, 1980

FIRST PENNSYLVANIA BANK, N.A.,
Petitioner,

vs.

JAY A. ZEFFIRO and HARRY M. BERNARD, JR.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A trust indenture is a private contract between an issuer of debt securities and an indenture trustee which defines the rights and duties that will govern the issuer, the trustee, and the security holders while the securities are outstanding.

Under the Trust Indenture Act of 1939 ("the Act"), 15 U. S. C. §§ 77aaa *et seq.*, nonexempted debt securities may not be offered or sold to the public unless the indenture relating to the securities has been "qualified" by the Securities and Exchange Commission ("SEC"). The indenture is qualified when the SEC certifies, *inter alia*, that it contains certain contractual provisions required by the Act.

The Act does not prohibit or declare unlawful the subsequent breach of required indenture provisions, nor does it expressly grant any private remedy for such a breach. The Act simply provides that the SEC may not qualify an indenture which does not contain the mandated provisions.

Other sections of the Act, by contrast, impose criminal penalties for specific statutory violations, and create an express federal private right of action for damages in favor of security holders who rely upon false or misleading statements made in documents filed with the SEC under the Act.

In the present case, holders of debt securities have sued an indenture trustee, petitioner First Pennsylvania Bank N. A. ("First Pennsylvania"), for alleged breaches of indenture provisions required by the Act. Although the complaints allege federal jurisdiction under the Act, no claim is made that First Pennsylvania violated the only section of the Act that expressly grants security holders a federal private right of action for damages.

Therefore, this case presents the important question explicitly left open by this Court in *Caplin v. Marine Midland Grace Trust Co.*, 406 U. S. 416 (1972):

> Whether a federal private right of action for damages or injunctive relief exists under the Trust Indenture Act of 1939, 15 U. S. C. §§ 77aaa *et seq.*, in favor of security holders against an indenture trustee for breach of provisions of a private trust indenture contract where those provisions are required by the Act to be included in the indenture contract.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming the denial of First Pennsylvania's motions to dismiss the complaints is not yet officially reported, and is printed in the Appendix at pp. A1-A28.

The opinion of the United States District Court for the Eastern District of Pennsylvania denying First Pennsylvania's motions to dismiss the complaints is officially reported at 473 F. Supp. 201 (E. D. Pa. 1979), and is printed in the Appendix at pp. A29-A51.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, dated May 29, 1980, was entered on May 29, 1980. (App. A56-A57). First Pennsylvania's timely petition for rehearing in banc, filed June 11, 1980, was denied by the United States Court of Appeals for the Third Circuit by Order entered June 26, 1980. (App. A58-A59).

The jurisdiction of this Court is invoked under and pursuant to 28 U. S. C. § 1254(1).

STATUTES INVOLVED

The Trust Indenture Act of 1939, 15 U. S. C. §§ 77aaa *et seq.* The relevant sections of the Act are set forth in the Appendix at pp. A60-A83.

STATEMENT OF THE CASE

A. Allegations of the Complaints

In May 1972, Capital Equipment Leasing Corporation, later known as Capital First Corporation ("Capital

First"),[1] issued certain 9% subordinated debentures due 1982 in the principal amount of $1,500,000. The debentures were issued pursuant to a trust indenture contract ("the Indenture") which named The First Pennsylvania Banking and Trust Company, a predecessor of petitioner First Pennsylvania, as indenture trustee. The Indenture was qualified under the Trust Indenture Act and contained, *inter alia,* those provisions which the Act requires to be included in a qualified indenture contract.

Subsequently, two class action complaints were filed by respondents Jay A. Zeffiro and Harry M. Bernard, Jr.[2] against First Pennsylvania seeking damages and equitable relief on behalf of past and present owners of the Capital First debentures, who claimed that their investments had become worthless. Although the complaints, which were consolidated by the District Court, alleged federal jurisdiction under section 322(b) of the Act, 15 U. S. C. § 77vvv(b) (App. A80-A81), no claim was made that First Pennsylvania had violated the only section of the Act that expressly grants security holders a federal private right of action for damages.[3] Instead, the complaints alleged that First Pennsylvania had breached certain provisions of the private trust indenture contract between First Pennsylvania and Capital First, resulting in the loss

1. Capital First was named as a defendant in the *Bernard* action but was never served with the complaint. On December 19, 1978, Capital First filed a petition for reorganization under Chapter 11 of the Bankruptcy Act, and all proceedings against it were automatically stayed. (App. A4, A31).

2. Isabella G. Smith, also named as a plaintiff in the *Bernard* action, withdrew from the litigation with the permission of the District Court. (App. A31). See *Zeffiro v. First Pennsylvania Banking and Trust Co.*, 82 F. R. D. 31 (E. D. Pa. 1979).

3. Section 323 of the Act, 15 U. S. C. § 77www (App. A81-A82), discussed at pp. 9, 19 *infra.*

of plaintiffs' investments, and that First Pennsylvania should be found liable to plaintiffs on a theory of implied liability under the Act for negligence, breach of contract and breach of trust.

Specifically, the complaints charged violations of the following provisions of the Indenture, all of which were mandated by the Act to be included in an indenture qualified by the SEC: (1) Section 6-1(b) of the Indenture, required by section 315(c) of the Act (App. A80), which allegedly required First Pennsylvania to exercise the care and skill of a "prudent man" after Capital First's alleged defaults; (2) Section 7-3 of the Indenture, required by section 313 of the Act (App. A76-A79), which allegedly required First Pennsylvania to transmit certain reports to plaintiffs; (3) Section 6-2 of the Indenture, required by section 315(b) of the Act (App. A79-A80), which allegedly required First Pennsylvania to transmit notices of Capital First's alleged defaults to plaintiffs; (4) Section 6-8 of the Indenture, required by section 310(b) of the Act (App. A64-A70), which allegedly required First Pennsylvania to take certain action in the event that a conflict of interest arose between it and plaintiffs; and (5) Section 6-13 of the Indenture, required by section 311(a) of the Act (App. A71-A76), which allegedly required First Pennsylvania to segregate certain assets which it received as a creditor of Capital First. (App. A4).[4]

B. Procedural History

First Pennsylvania moved to dismiss the complaints, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for

4. The complaints also alleged that First Pennsylvania had breached certain provisions of the Indenture which the Act permitted, but did not require, to be included in a qualified indenture. The court below held that breach of these permissive provisions did not give rise to a federal private right of action under the Act.

lack of subject matter jurisdiction and for failure to state a federal claim under the Act. On June 28, 1979, the United States District Court for the Eastern District of Pennsylvania denied the motions to dismiss (App. A29-A51), but certified its decision for interlocutory appeal under 28 U. S. C. § 1292(b) as involving a controlling question of law as to which there was substantial ground for difference of opinion. The question certified was "whether a federal private right of action for damages exists under the Trust Indenture Act . . . in favor of debentureholders against an indenture trustee for alleged breach of a trust indenture contract conforming to the requirements of the Act." (App. A52-A53).

The United States Court of Appeals for the Third Circuit thereafter granted First Pennsylvania permission to appeal from the certified order of the District Court. (App. A54-A55). On May 29, 1980, after briefing and oral argument in which the Securities and Exchange Commission participated as *amicus curiae*, a divided panel of the Court of Appeals affirmed, holding that plaintiffs had an implied federal private right of action under the Act to maintain their damage suits against First Pennsylvania for breach of indenture provisions mandated by the Act. (App. A1-A28, A56-A57). First Pennsylvania's timely petition for rehearing in banc was denied by the Court of Appeals on June 26, 1980. (App. A58-A59).

C. The Court of Appeals Opinion

The holding of the panel majority was predicated on the assumption that Congress, in the Act, had sought to impose a nationally uniform solution to questions arising under mandatory provisions of trust indenture contracts, and that implication of a federal private right of action would be a "necessary and helpful" means of effectuating

that supposed congressional purpose. According to the opinion of the panel majority:

> "A necessary means of facilitating the national uniformity goal of the Act would be through enforcement of the indenture in a federal forum. It is hard to believe that Congress would have established uniform standards to govern indentures and then paradoxically have allowed the application of those standards to depend on the law of the state of the suit. The interpretation of the indenture provisions mandated by the Act does not depend on ordinary contract principles—the intent of the parties—but depends on an interpretation of the legislation. It would be contrary to the purposes of the Act to have the trustee held to certain standards in one state court and potentially different standards in another. Thus, federal court jurisdiction is necessary to achieve the uniform standards intended by the Act." (App. A20-A21, footnotes omitted).

The panel majority further found the decisions of this Court in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. 11 (1979), and *Touche Ross & Co. v. Redington*, 442 U. S. 560 (1979), to be "easily distinguishable" from the present case, and summarily disposed of them in a single footnote. (App. A24-A25).

In a separate, dissenting opinion, Judge Layton rejected the analysis of the panel majority and concluded that a federal private right of action could not be implied under the Act. (App. A25-A28). Both *Lewis* and *Touche Ross*, reasoned Judge Layton, control the disposition of the case at bar, and those decisions require a showing that Congress *intended* to create a private right of action when it did not do so expressly. Significantly, Judge Layton found

no evidence whatsoever that Congress, in the Act, intended either to impose a nationally uniform solution to trust indenture questions or to create a federal private right of action for breach of mandated indenture provisions. Instead, he found in the language and legislative history of the Act a clear indication that Congress intended state, not federal, courts to adjudicate suits for breach of qualified indenture contracts. Thus, concluded Judge Layton, the result imposed by the panel majority contravened the expressed intent of Congress in the Act, and conflicted with the standards of statutory construction articulated by this Court in *Lewis* and *Touche Ross*.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises Questions of Exceptional Importance Which Should Be Settled by This Court

The ruling of the Court of Appeals that a federal private right of action for damages may be implied under the Trust Indenture Act raises questions of exceptional importance expressly left open by this Court in *Caplin v. Marine Midland Grace Trust Co.*, 406 U S. 416, 426-27 n. 17, 433 n. 23 (1972). By holding that the Act was designed to impose uniform national standards which can best be enforced in federal courts, the Court of Appeals has invited wholesale transfer of breach of contract litigation involving trust indentures from the state courts to the federal courts.

Prior to the passage of the Act, questions relating to trust indentures "had been governed by the common law of contracts and fiduciary obligations, articulated primarily in the state courts." *Morris v. Cantor*, 390 F. Supp. 817, 819 (S. D. N. Y. 1975). The Court of Appeals majority conceded that the "legislative history of the Act does not explicitly deal with the ability of investors to bring suit in federal court," (App. A16), and "does not specify the proper forum" for a suit against an indenture trustee for breach of indenture provisions mandated by the Act (App. A17). In concluding nevertheless that federal courts should be able to entertain such suits, even in the absence of express congressional authorization, the Court of Appeals majority ignored the intent of Congress as reflected in the language and legislative history of the Act.

1. The Structure and Intent of the Trust Indenture Act of 1939

The Trust Indenture Act was the last major New Deal legislation dealing with the securities markets. It was

designed to respond, through a system of limited federal regulation, to certain specific deficiencies that were prevalent in trust indenture contracts of the time. Thus, Section 302 of the Act, 15 U. S. C. § 77bbb (App. A60-A62), entitled "Necessity for regulation," identifies six "practices" unearthed in the congressional hearings which the Act was designed to "eliminate." Principal among such practices was the inclusion of standard provisions in indentures relieving negligent trustees from any liability for wrongdoing and relieving the trustee from any duty to take action in the event of a default.[5] As the Senate Report[6] indicated:

> "The bill proceeds on the theory that *the proper remedy is to correct these deficiencies in the trust indenture,* and that the appropriate time to correct those deficiencies is before the bonds are offered in interstate commerce or through the mails."

To "correct those deficiencies" identified in the hearings, Congress chose to require certain provisions to be included in every indenture qualified by the SEC, and to prohibit other, exculpatory provisions. Sections 310 through 318 of the Act, portions of which provide the basis for the claims made in this case (App. A64-A80), identify the terms which are required, prohibited, or permitted in a qualified trust indenture. Those sections characteristically begin by stating that "The indenture to be qualified shall [or may or shall not] contain provisions requiring" certain actions by the indenture trustee or others.

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5. Section 302(a)(2), 15 U. S. C. § 77bbb(a)(2) (App. A60-A61).

6. S. Rep. No. 248, 76th Cong., 1st Sess. 8 (1939) ("Senate Report"). (Emphasis added).

While sections 310 through 318 of the Act mandate the inclusion of certain provisions in qualified trust indentures before the underlying securities may be sold to the public, those sections do not prohibit any subsequent breaches of the required indenture provisions, nor do they expressly create any federal private right of action to sue an indenture trustee for breaches of such provisions. This failure to declare such breaches unlawful or to provide a federal right to sue for damages resulting from such breaches stands in marked contrast to section 323 of the Act. (App. A81-A82). That section, as this Court noted in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. at 20-21 & n. 10, expressly provides a federal right to sue in favor of any person who purchases or sells a security issued under an indenture in reliance upon false or misleading statements contained in documents filed with the SEC under the Act.

The failure to provide a federal private right of action to sue for breach of provisions required to be included in a qualified indenture by sections 310 through 318 of the Act was no drafting error. Instead, it reflects a conscious congressional choice to leave the injured debt security holder to his adequate and traditional state law remedies, now fortified by federal prohibition of exculpatory provisions relieving trustees of liability. Rather than open federal courts to a flood of state contract suits, Congress intended to leave the state courts jurisdiction over such disputes. As Judge Layton, dissenting, noted in the Court of Appeals (App. A25-A28), this is clear not only from the statutory language and history, but also from the testimony given during the hearings on the Act by then-SEC Chairman William O. Douglas, who explicitly stated that:

> "The indenture, after it has been 'qualified' under this statute, will be enforceable in the same manner

> as any other contract is enforceable, *in the same manner that indentures presently executed are enforceable.*"[7]

The conscious decision of Congress to leave such contract suits in the state courts is well-illustrated also by the claims made both in this case and in *Caplin, supra,* that the indenture trustee failed to take actions mandated by section 315(c) of the Act after the obligor's default (App. A4). That section, entitled "Duties of the trustee in case of default," provides that:

> "The indenture to be qualified shall contain provisions requiring the indenture trustee to exercise in case of *default* (*as such term is defined in such indenture*) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a *prudent man* would exercise or use under the circumstances in the conduct of his own affairs." (App. A80). (Emphasis added).

Conspicuously, the Act does not define the key term "default," but instead leaves the definition of that critical term to the contracting parties. Any determination of whether such a "default" has occurred would necessarily be determined by resort to the intent of the contracting parties and the applicable state law. Moreover, if a state court decided that a "default" had occurred, it then would be obliged to measure the post-default actions of the trustee against the "prudent man" standard. Once again, this crucial term is not defined by the Act, and the legislative history clearly indicates that Congress meant only to adopt the traditional state law standard "applicable in

7. Hearings on H. R. 10292 Before Subcomm. of Comm. on Interstate and Foreign Commerce, 75th Cong., 3d Sess. 22 (1938). (Emphasis added).

the field of personal trusts." [8] Indeed, a recent law review article which analyzed the very question presented for review in this case concluded:

> "*When Congress enacted [the Trust Indenture Act], it intended neither to allow bondholders resort to a federal forum nor to federalize the prudent man concept.* It simply sought to mandate that a particular private contract, namely the indenture, should now contain a provision establishing the appropriate standard of trustee conduct during default administration." Dropkin, *Implied Civil Liability Under the Trust Indenture Act: Trends and Prospects*, 52 Tul. L. Rev. 299, 323 (1978). (Emphasis added).

The American Law Institute has similarly concluded that "the 'prudent man' test in [§] 315(c) . . . might well receive different constructions under the laws of the several states." ALI Federal Securities Code xxxviii (1980).

In sum, the reliance in required indenture provisions upon state law—which the Court of Appeals majority found "hard to believe" (App. A20)—is not only permitted, but is clearly required, by the Act. Conceptual confusion is likely to arise not from the application of settled state law to give meaning to the Act's "uniform standards," but rather from the application of a nebulous and undefined federal common law of trusts, the substance of which is nowhere found in the statute or the legislative history of the Act, and the evolution of which would hopelessly and impermissibly enmesh the federal courts in areas traditionally and deliberately relegated to state law. It was just such a confusion that this Court refused to permit in *Santa Fe Industries, Inc. v. Green*, 430 U. S. 462, 478-79 (1977), where it declared that:

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8. H. R. Rep. No. 1016, 76th Cong., 1st Sess. 55 (1939) ("House Report").

"The result would be to bring within the Rule [10b-5] a wide variety of corporate conduct traditionally left to state regulation. In addition to posing a 'danger of vexatious litigation . . . ,' this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law. Federal courts applying a 'federal fiduciary principle' under Rule 10b-5 could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system. *Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.*" (Emphasis added and footnote omitted).[9]

2. The Ruling of the Court of Appeals Threatens to Create a Nebulous and Unlimited "Federal Trust Law" Which Will Govern an Increasingly Large Number of Indenture Defaults

The decision of the Court of Appeals majority threatens to impose a new and nebulous federal law of trusts upon indenture trustees more than forty years after the Act was passed. During those forty years, disputes

9. The Court of Appeals majority also argued that absent an original federal forum, this Court would be unable to resolve conflicting interpretations of the Act. (App. A21). This very point was squarely rebutted more than a decade ago in a *Harvard Law Review* article which concluded that even though suits for breach of a mandatory indenture provision did not "arise under" the Act so as to vest original federal question jurisdiction in the federal district courts, this Court could nevertheless review federal questions arising in state court suits under the Act. *See* Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 318 (1969). *Accord*, ALI Federal Securities Code xxxviii (1980).

regarding breaches of indenture provisions mandated by the Act have continued, with few exceptions, to be litigated in the state courts under state contract and trust law.[10] The importance of a diversion of such cases into the federal courts is obvious. During fiscal 1977 alone, for example, 358 trust indentures relating to nearly 25 billion dollars in securities were filed with the SEC.[11] Moreover, the generally favorable financial conditions between 1940 and 1970, which held down the number of cases adjudicating the duties of indenture trustees under the Act,[12] have now been replaced with sharply deteriorating financial conditions which have increased the number of corporate bankruptcies[13] and debenture defaults,[14] bringing to

10. *See, e.g., Haas v. Palace Hotel Co.*, 101 Cal. App. 2d 108, 224 P. 2d 783 (1950), *cert. denied*, 342 U. S. 813 (1951); *Young v. Distinctive Devices, Inc.*, No. 1119 (N. Y. Ct. App., Dec. 13, 1979), *cert. denied*, 48 U. S. L. W. 3733 (1980); *Ray v. Marine Midland Grace Trust Co.*, 35 N. Y. 2d 147, 359 N. Y. S. 2d 28 (1974); *United States Trust Co. v. First National City Bank*, 57 A. D. 2d 285, 394 N. Y. S. 2d 653 (App. Div. 1977); *Galdo v. First Pennsylvania Bank N. A.*, 250 Pa. Super. Ct. 385, 378 A. 2d 990 (1977).

11. 43 SEC Ann. Rep. 118 (1977).

12. *See Fidelity Mortgage Investors v. First National City Bank*, 387 F. Supp. 544, 546 (S. D. N. Y. 1974); Johnson, *Default Administration of Corporate Trust Indentures: The General Nature of the Trustee's Responsibility and Events of Default*, 15 St. Louis U. L. J. 203 (1970).

13. One analyst, noting the "staggering" growth of corporate bankruptcies over the past decade, has estimated that between 1969 and 1979, the number of annual business filings for bankruptcy mushroomed by 91 percent, from 15,430 to 29,500. N. Y. Times, Jan. 6, 1980, § 12 (National Economic Survey), at 50.

14. For example, between 1972 and 1977, Morgan Guaranty Trust Co. of New York, which administers over 500 trust indentures, experienced its heaviest period of defaults since the 1930's. By contrast, Morgan experienced only two defaults from 1950

the judicial forefront the pressing questions now presented for definitive determination by this Court. Indeed, since 1975 alone, four district courts [15] and now, for the first time, a federal court of appeals, have ruled upon the important legal issue expressly reserved by this Court in *Caplin*.

The importance of the decision below is also highlighted by its coverage in the financial and legal press [16] and by the participation of the SEC in the Court of Appeals oral argument, an extraordinary step which was permitted only after the SEC argued in its motion papers that the present case posed "an important issue" and "could significantly affect future enforcement of the Act." [17]

Whether cases such as the present one should be litigated in federal courts poses a question at the heart of this Court's most basic concerns. As Mr. Chief Justice Warren told the American Law Institute some twenty-one years ago:

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14. (Cont'd.)
through 1969. Memorandum from Davis Polk and Wardwell to Professor Louis Loss (Jan. 10, 1977) (submitted in connection with the proposed Federal Securities Code).

15. In addition to the decision of the District Court herein, *see Mathews v. Fisher*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,336 (S. D. Ohio 1978); *In re Equity Funding Corp. of America Securities Litigation*, 416 F. Supp. 161, 203 (C. D. Cal. 1976), *aff'd on other grounds*, 603 F. 2d 1353 (9th Cir. 1979); *Morris v. Cantor*, 390 F. Supp. 817 (S. D. N. Y. 1975).

16. *See, e.g.*, Wall St. J., June 2, 1980, at 31; 48 U. S. L. W. 2823 (1980); 48 U. S. L. W. 2077 (1979); 557 Sec. Reg. & L. Rep. (BNA), at A13 (1980); [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,514 (1980); Pa. L. J., June 23, 1980, at 1.

17. Motion of the Securities and Exchange Commission, Amicus Curiae, For Leave to Participate in Oral Argument, pp. 1, 2 (Jan. 10, 1980).

> " 'It is essential that we achieve a proper jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in the light of the basic principles of federalism.' " [18]

Echoing those same concerns this year, Mr. Chief Justice Burger warned the same group of an emerging tendency to merge state and federal court jurisdiction which might well end, if unchecked, in "an irreversible erosion" of these "basic principles of federalism." [19] If litigation involving breach of contract provisions included in qualified trust indentures is now to be diverted from state to federal courts some forty-one years after enactment of the Trust Indenture Act, a due regard for these "basic principles of federalism" requires review by this Court of the split decision of the Court of Appeals in this important case.

B. The Court of Appeals Decision Conflicts With This Court's Decisions in Transamerica Mortgage Advisors, Inc. v. Lewis and Touche Ross & Co. v. Redington

Since 1972, when the question whether a federal private right of action exists under the Trust Indenture Act was explicitly reserved by this Court in *Caplin v. Marine Midland Grace Trust Co., supra,* this Court has decided numerous cases which sharply restrict the instances in which a federal private right of action may be implied under the federal securities laws and other federal legislation.[20] These cases, culminating in *Transamerica*

18. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 1 (1968), *quoting* American Law Institute Proceedings 33 (1959).

19. Welcoming Remarks of Mr. Chief Justice Burger, American Law Institute 1980 Annual Meeting, Washington, D. C., June 10, 1980, p. 5.

20. *See, e.g., Kissinger v. Reporters Committee for Freedom of the Press,* 48 U. S. L. W. 4223 (U. S. March 3, 1980) (no private

Mortgage Advisors, Inc. v. Lewis, supra, and *Touche Ross & Co. v. Redington, supra,* mandate a "stricter standard" of statutory construction for implying a right to sue where Congress has not explicitly provided such a right. Under that standard:

> "The central inquiry remains whether Congress *intended* to create, either expressly or by implication, a private cause of action. . . . *[Where] the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful . . . and the legislative history . . . does not speak to the issue of private remedies . . . , the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of*

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20. (Cont'd.)

right of action under Federal Records Act); *Transamerica Mortgage Advisors, Inc. v. Lewis, supra* (no private right of action for damages under § 206 or § 215 of Investment Advisers Act); *Touche Ross & Co. v. Redington, supra* (no private right of action under § 17(a) of 1934 Act); *Chrysler Corp. v. Brown,* 441 U. S. 281 (1979) (no private right of action under Trade Secrets Act); *Santa Fe Indus., Inc. v. Green,* 430 U. S. 462 (1977) (no private right of action under Rule 10b-5 for breach of corporate fiduciary duty not involving manipulation or deception); *Piper v. Chris-Craft Indus., Inc.,* 430 U. S. 1 (1977) (no private remedy in favor of a tender offeror claiming misrepresentation by a competing tender offeror); *Ernst & Ernst v. Hochfelder,* 425 U. S. 185 (1976) (no private right of action for damages under § 10(b) of 1934 Act in absence of an allegation of scienter); *Cort v. Ash,* 422 U. S. 66 (1975) (no private right of action on behalf of corporation for violations of statute prohibiting corporate election contributions); *Rondeau v. Mosinee Paper Corp.,* 422 U. S. 49 (1975) (restricting class of private litigants who may obtain injunctive relief under § 13(d) of 1934 Act to those who can show "irreparable harm"); *Securities Investor Protection Corp. v. Barbour,* 421 U. S. 412 (1975) (no private right of action to compel SIPC to act available to customers under the SIPA of 1970.

action, has been definitely answered in the negative." *Touche Ross*, 442 U. S. at 575-76. (Emphasis added).

The majority opinion of the Court of Appeals in the present case is a classic example of the kind of "judicial legislation" which this stricter standard of statutory construction was designed to prohibit. The Court of Appeals majority disregarded several key features of the Trust Indenture Act which *Lewis* and *Touche Ross* identified as evidence that Congress did *not intend* to create an unspoken federal right to sue:

(1) The sections of the Trust Indenture Act relied upon by plaintiffs simply require the inclusion of certain provisions in the private trust indenture contract. Thus, those sections begin by stating, "The indenture to be qualified shall contain provisions requiring" certain actions. (App. A64-A80). *Touche Ross*, however, held that in all of the prior decisions of this Court finding an implied right of action, "the statute in question at least *prohibited certain conduct* or *created federal rights* in favor of private parties." 442 U. S. at 569. (Emphasis added). This, the Trust Indenture Act does not do, in the sections relied upon by plaintiffs. In contrast to those sections of the Act which impose criminal penalties for specific statutory violations (App. A62-A64, A82-A83), the sections of the Act relied upon by plaintiffs neither prohibit any conduct nor declare any conduct unlawful. Moreover, in contrast with section 323 of the Act, which expressly grants security holders a federal right of action for damages under circumstances not alleged in this case (App. A81-A82), the sections of the Act upon which plaintiffs rely concededly contain no language which even purports to create any federal rights or remedies in favor of security holders.

(2) The Court of Appeals majority implied a federal private right of action even though it expressly conceded

that the "legislative history of the Act does not explicitly deal with the ability of investors to bring suit in federal court." (App. A16). *Touche Ross* instructed, however, that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best," particularly where, as here, "the plain language of the provision weighs against implication of a private remedy." 442 U. S. at 571.

Indeed, as set forth above,[21] the legislative history of the Act clearly confirms that Congress' silence regarding federal enforcement of trust indenture contracts was purposeful. *See Kissinger, supra,* 48 U. S. L. W. at 4226. In order to cure the specific deficiencies that were prevalent in trust indenture contracts of the time, Congress chose simply to require, permit or prohibit the inclusion of certain specified terms in the indenture contract. There is no evidence, however, that Congress intended to displace or preempt the traditional jurisdiction of *state courts* over the *enforcement* of those private contracts. Thus, as numerous commentators have recognized,[22] the legislative history of the Act indicates that Congress considered the existing body of common law and state court enforcement procedures entirely sufficient to protect investors once certain minimum provisions were written into, and certain artificial barriers to liability were removed from, the private trust indenture contract.[23]

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21. *See* pp. 7-11 *supra.*

22. *See, e.g.,* Dropkin, *Implied Civil Liability Under the Trust Indenture Act: Trends and Prospects,* 52 Tul. L. Rev. 299, 323 (1978); Greene, *Hybrid State Law in the Federal Courts,* 83 Harv. L. Rev. 289, 318 (1969); Stark, *The Trust Indenture Act of 1939 in the Proposed Federal Securities Code,* 32 Vand. L. Rev. 527, 543 (1979).

23. In fact, since the passage of the Act, state courts have continued to exercise their traditional jurisdiction over the enforcement of trust indenture contracts. *See* cases cited at p. 13 n. 10 *supra.*

(3) In *Lewis*, this Court specifically cited section 323 of the Trust Indenture Act as demonstrating that " 'when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly.' " 444 U. S. at 20-21 & n. 10. (Citation omitted). Given the private right of action for damages explicitly granted to security holders in section 323 (App. A81-A82), no further federal private rights of enforcement may be implied. See *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U. S. 453, 458 (1974). As this Court emphasized in *Lewis*:

> "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 444 U. S. at 19.

(4) Many of the mandatory provisions of the Trust Indenture Act relied upon by plaintiffs perform a function similar to that performed by section 17(a) of the Securities Exchange Act of 1934, which was held by this Court in *Touche Ross* not to give rise to an implied private right of action for damages. Section 17(a) of the 1934 Act requires certain reports to be filed "for the protection of investors." Sections 313 and 315(b) of the Trust Indenture Act, which the Court of Appeals held gave rise to an implied federal right of action, similarly require the indenture trustee merely to transmit certain reports and notices.[24] (App. A76-A80). *Touche Ross* concluded that such statutes are "forward-looking, not retrospective; [they seek] to forestall insolvency, not to provide recompense after it has occurred." 442 U. S. at 570-571. Here, as in

24. Plaintiffs allege that First Pennsylvania violated provisions of the Indenture required by these sections of the Act. *See* p. 3 *supra*.

Touche Ross, the intent of these sections of the Trust Indenture Act is evident from their face—they are merely reporting devices which do not, by any stretch of their language, purport to confer a federal right to sue for damages upon an affected security holder.[25]

In addition to ignoring these significant indicia that Congress did *not* intend to federalize the enforcement of private trust indenture contracts, the Court of Appeals majority misapplied this Court's recent decision in *Transamerica Mortgage Advisors, Inc. v. Lewis, supra*. *Lewis* rejected an implied private right of action under the Investment Advisers Act of 1940 even though it found that section 206 of that Act established "federal fiduciary duties" which Congress clearly intended to be "enforceable," and that plaintiffs in that case were the intended beneficiaries of section 206.

Ironically, the Court of Appeals majority opinion stood *Lewis* on its head by relying on this Court's additional holding in *Lewis* that a limited private right of action for *injunctive* relief could be implied under language in section 215 of the Advisers Act which declares that contracts made in violation of the Advisers Act "*shall be void.*" (App. A17-A19). That holding, however, provides no support whatsoever for implying a private right of action under the Trust Indenture Act.

First, as this Court emphasized in *Lewis*, the language of Section 215 of the Advisers Act declaring certain contracts "void" *expressly* creates or alters civil liabilities. 444 U. S. at 19. That section has no counterpart in the provisions of the Trust Indenture Act relied upon by plaintiffs, which merely require that certain provisions be

25. Indeed, the legislative history clearly indicates that the Act as a whole was intended to serve a *prophylactic*, not a remedial, function. *See, e.g.*, House Report, *supra*, at 26; Senate Report, *supra*, at 8; 84 Cong. Rec. 5007 (1939) (remarks of Sen. Barkley).

included in a qualified indenture. (App. A64-A80). Indeed, as Judge Layton stressed in his dissenting opinion in the Court of Appeals, the Advisers Act voidness language is "completely foreign to the provisions of the [Trust Indenture] Act here under consideration." (App. A26). Moreover, *Lewis* specifically held that such language gave rise only to specific and limited equitable relief, such as a suit for rescission, and did not authorize plaintiffs to recover damages under Section 215 for the diminution in the value of their investments—the very relief sought by plaintiffs herein. 444 U. S. at 24 n. 14. Further undermining the reliance of the Court of Appeals opinion upon *Lewis* is the fact that the legislative history of the Trust Indenture Act—unlike the legislative history of the Advisers Act—indicates that Congress fully intended aggrieved investors (in the words of Judge Layton) "to use the state, not federal, courts for a remedy." (App. A27).

Finally, the Court of Appeals also erred in holding that the judicial implication of a federal private right of action would be a "necessary and helpful" means of protecting security holders and effectuating the supposed remedial purposes of the Act. While such an analysis was once given currency in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), this Court has subsequently limited *Borak* in favor of "a stricter standard for the implication of private causes of action." *Touche Ross*, 442 U. S. at 578. Under this Court's "stricter standard" of statutory construction, arguments "concerning the 'necessity' of implying a private remedy" have "little relevance" where, as here, neither the language nor the legislative history of the Act support the implication of a federal private right of action. *Touche Ross*, 442 U. S. at 575.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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